Nos. 6994 and 6995

In the United States Circuit Court of Appeals for the Ninth Circuit

MARIAN B. PRINGLE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

PHYLLIS B. BRUNSON, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITIONS FOR REVIEW OF DECISION OF THE UNITED STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

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CITATIONS

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OPINION BELOW

The only previous opinion in these cases is that of the United States Board of Tax Appeals (R. 23–32), which is reported in 26 B. T. A. 362.

JURISDICTION

These cases involve taxes for the year 1923 in the total amount of $6,487.70. (R. 15, 32.)[1] The de-

[1] The deficiency in each case is $3,243.85. (R. 15.)

cision of the Board of Tax Appeals was entered June 10, 1932. (R. 32.) Petitions for review were filed September 7, 1932 (R. 42),[2] pursuant to Sections 1001–1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109–110 (U. S. C. Supp. VI, Secs. 641–642).

QUESTION PRESENTED

When did the petitioners *acquire* the property which they sold during July and August, 1923?

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227:

> SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that—
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> * * * * *
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> (3) In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of such acquisition. The provisions of this paragraph shall apply to the acquisition of such property interests as are specified in subdivision (c) or (e) of section 402.
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[2] The cases were consolidated for hearing before the Board (R. 15) and but one finding of fact and one opinion entered (R. 48). The same question is involved in both cases, and therefore by stipulation (R. 47) both cases are to be presented upon the record in No. 6994.

Treasury Department Regulations 62 (1922 Edition):

> ART. 1563. *Sale of property acquired by gift on or before December 31, 1920, or by bequest, devise, or inheritance.*—In computing the gain or loss from the sale or other disposition of property acquired by gift on or before December 31, 1920, or by request, devise, or inheritance, the basis shall be the fair market price or value of such property at the time of acquisition. * * *. In the case of property acquired by bequest, devise, or inheritance, its value as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value when acquired.

STATEMENT

Ida Wilcox Beveridge died August 7, 1914 (R. 16), leaving surviving: Philo J. Beveridge, husband (R. 16); Marian Beveridge (now Marian Pringle, one of the petitioners) and Phyllis Beveridge (now Phyllis Brunson, one of the petitioners), daughters (R. 17); Amelia J. Hartwell, mother (R. 22); and Madge H. Connell, sister (R. 16). By the terms of her will she left certain real estate situated in California in trust for a period of twenty-five years from the birth of her younger daughter Phyllis, providing, however, that the trust

should terminate should both of her daughters die before that date. (R. 18.) The will provided that upon the expiration of the trust the property "shall descend to and be distributed among such of my children as shall be living at the expiration of such trust, share and share alike" but that should either daughter be dead at the end of the trust period leaving issue, such issue should take the share of the parent; should one die without issue, then the whole would go to the survivor; should both die before the end of the trust period leaving no issue, title would vest in her husband and sister, share and share alike, should they be living at that time. Provision was made against the event either husband or sister, or both, should be dead. (R. 18–19, 22.)

Phyllis Beveridge Brunson reached the age of 25 years on July 25, 1923, and on July 26, 1923, the real estate here in question was distributed to the two daughters as tenants in common, share and share alike. (R. 22.)

Between July 29 and August 1, 1923, the real estate in question was sold by petitioners for $276,-222.76. The fair market value of such property on July 26, 1923, was the same as the selling price. However, its fair market value as of the date of the death of petitioners' mother was $76,600. (R. 23.)

In determining the profit accruing from the transaction the Commissioner of Internal Revenue took as the base $76,600, the value of the property as of the date of the death of petitioners' mother

(R. 12, 23), and determined deficiencies accordingly (R. 11–12, 23).

Appeals were taken to the Board of Tax Appeals, where it was contended that the basis for determining gain or loss should have been the value of the property on July 25, 1923, the date Phyllis B. Brunson, became twenty-five years of age. (R. 3–8, 24.)

The Board of Tax Appeals rejected petitioner's contention and sustained the deficiencies. (R. 23–32.) Petitioners bring the question thus presented to this Court for review.

SUMMARY OF ARGUMENT

Section 202 (a) (3) of the Revenue Act of 1921 (*supra,* p. 2), as construed by the officers in charge of its administration, fixes the basis for determining the gain derived or loss sustained upon the sale of property received by devise, bequest, or inheritance as " its value as appraised for the purpose of the Federal estate tax ", i. e., its value at the date of decedent's death. By subsequent reenactments of the statute the administrative interpretation has received the implied approval of Congress. As so construed, the statute is valid when applied to petitioners, even though they received but a contingent estate upon the death of their mother. See *Taft* v. *Bowers,* 278 U. S. 470; *Osburn California Corporation* v. *Welch,* 39 F. (2d) 41 (C. C. A. 9th).

ARGUMENT

The basis for determining gain derived or loss sustained upon the sale of property acquired by devise is its value as established for estate tax purposes, i. e., its value at the date of the death of the decedent

Section 202 (a) of the Revenue Act of 1921 (*supra*, p. 2) fixes the basis for determining gain derived or loss sustained upon the sale or disposition of property acquired after February 28, 1913, as being the cost, except that—

> (3) In the case of such property, acquired by bequest, devise, or inheritance, the basis shall be the fair market value of such property at the time of such acquisition.

Petitioners contend that their acquisition of the real estate involved was made contingent upon their being alive at the termination of the trust period, and therefore that the property was not acquired by them until July 25, 1923, when that contingency occurred. From this premise they argue that the basis for determining gain or loss was the value of the real estate on July 25, 1923, and not on August 7, 1914, as determined by the Commissioner. It is submitted that even though the premise were sound the conclusion is not warranted.

Article 1563 of Treasury Regulations 62 (*supra*, p. 3), promulgated under the above section, provides that in computing the gain derived or loss sustained from the sale or other disposition of property acquired by bequest, devise, or inherit-

ance, the basis shall be " its value as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax is value as appraised in the State court for the purpose of State inheritance taxes." Article 1562 of Treasury Regulations 45, promulgated under the Revenue Act of 1918 (c. 18, 40 Stat. 1057), was the same, and an identical provision was carried forward into Article 1594 of Treasury Regulations 65, promulgated under the Revenue Act of 1924 (c. 234, 43 Stat. 253), and Article 1594 of Treasury Regulations 69, promulgated under the Revenue Act of 1926 (c. 27, 44 Stat. 9).

Section 202 (a) (3) was new in the Revenue Act of 1921. It was carried forward into Section 204 (a) (5) of the Revenue Acts of 1924 and 1926. When H. R. 1, which later became the Revenue Act of 1928 (c. 852, 45 Stat. 791) passed the House it contained a similar provision. However, when it reached the Senate it was amended. So far as here material the section as so amended and as it finally was enacted into law provided (Sec. 113 (a) (5)):

> If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent.

See the Senate Print, H. R. 1, 70th Congress, 1st Session, p. 82 (dated May 3, 1928). The report of

the Committee on Finance (S. Rep. No. 960, 70th Cong., 1st Sess., p. 26) discloses that the Senate had no thought of changing the law so far as it applied to a situation such as that here involved.[3] With relation thereto it said:

> The House bill in section 113 (a) (5) provides that in such cases the basis shall be the fair market value of the property *at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.*
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> * * * * *
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> Accordingly, the committee has revised section 113 (a) (5) and certain related sec-

[3] So far as it pertained to section 113 (a) (5), the full Committee Report is as follows:

"The decision by the Court of Claims in *McKinney* v. *United States* has caused confusion in the existing law as to the basis on which an executor must determine gain or loss on the sale by him of property of the estate. The House bill in section 113 (a) (5) provides that in such cases the basis shall be the fair market value of the property at the time of the death of the decedent. In the same section the House bill provides the same basis shall be used where the property is sold by the beneficiary.

"It appears that the House bill is inadequate to take care of a number of situations which frequently arise. For example, the executor, pursuant to the terms of the will, may purchase property and distribute it to the beneficiaries, in which case it is impossible to use the value at the decedent's death as the basis for determining subsequent gain or loss, for the decedent never owned the property. Moreover, the fair market value of the property at the decedent's

tions, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, *the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary.* (Italics supplied.)

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death can not properly be used as the basis, in the case of property transferred in contemplation of death where the donee sells the property while the donor is living.

"Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest but by general bequest or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary."

From a full reading of this report as set forth in footnote (3) it will be observed that the revision of Section 113 (a) (5) related to other phases of the section. So far as material here the two extracts from the Committee Report set out above make it plain that the Senate did not intend to change the existing law. It is therefore submitted that if there is any logic in the contention that the word "acquisition" applies literally to the time when title actually vests, such "logic must yield to history" (*Schuette* v. *Bowers,* 40 F. (2d) 208, 213 (C. C. A. 2d), and history makes it perfectly clear that not only has Congress, by the reenactment of the statutory provisions of Section 202 (a) (3) of the Revenue Act of 1921 in Section 204 (a) (5) of the Revenue Acts of 1924 and 1926, impliedly approved the administrative interpretation of the statute (*Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *Poe* v. *Seaborn,* 282 U. S. 101, 116; *The Massachusetts Mutual Life Insurance Co.* v. *United States,* No. 322, S. Ct., October Term, 1932, decided February 6, 1933, not officially reported but found in Vol. 1, Prentice-Hall Fed. Tax Service (1933), p. 779), but the Senate Committee on Finance in drafting Section 113 (a) (5) of the 1928 Act interpreted the House draft of the Bill which continued the former provision of the statute as fixing the basis where property is sold by a beneficiary as the value of the property at the date of

the decedent's death, thus accepting the administrative interpretation of the statute. It is therefore submitted that it was the intent of Congress that one receiving real property by devise should take as his base the value of the property at the date of the decedent's death, thus providing that the devisee should pick up the property where the decedent laid it down. See *Brewster* v. *Gage*, 280 U. S. 327.

In treating all real estate acquired by devise as having been acquired at the date of the decedent's death, Congress and the administrative officers have done nothing more than treat all the several parts and ceremonies necessary to complete the transfer of title as one act, operating from the date of the first substantial part by relation. That this may be done is firmly established (*United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 334–335), and it has often been resorted to in the application of taxing statutes (see *Brewster* v. *Gage*, 280 U. S. 327, 334; *Schuette* v. *Bowers*, 40 F. (2d) 208, 213 (C. C. A. 2d); *People ex rel. Gould* v. *Barker*, 150 N. Y. 52, 57–59; *Smith* v. *Northampton Bank*, 4 Cushing (58 Mass.) 1, 12; *Commonwealth* v. *Bingham's Admr.*, 188 Ky. 616, 619–620), and such doctrine of relation applies with particular force to a situation like the one here involved (*Chandler* v. *Field*, 58 F. (2d) 370 (N. H.)), affirmed (C. C. A.

1st) January 3, 1933, not officially reported but found in Vol. 1, Prentice-Hall Fed. Tax Service (1933), p. 654.

Concededly the direct source of petitioners' title was the will of their mother (see their brief, pp. 19–20), and that will provided that the property should "descend to and be distributed among" petitioners (R. 18). If that provision of the will was valid, and its validity is essential to petitioners' contention that they received but a contingent estate (Br. 19–20), it follows that by the very terms of the will petitioners' acquisition of the property related back to and came directly from their mother. It follows that even though petitioners' received but a contingent remainder their acquisition thereof related back to the mother's death.

In any event, it was clearly within the power of Congress to provide that one receiving property by devise, bequest, or inheritance should take as his base the value of the property at the death of the decedent (see *Taft* v. *Bowers,* 278 U. S. 470; *United States* v. *Phellis,* 257 U. S. 156, 171; *Osburn California Corporation* v. *Welch,* 39 F. (2d) 41 (C. C. A. 9th), and, as appears above, it is our contention that it did so. Such a construction of the statute makes for uniformity, reaches the substance rather than the form (cf. *Chandler* v. *Field, supra*), and gives effect to the manifest intent of Congress.

CONCLUSION

It is therefore submitted that the decision of the Board of Tax Appeals should be affirmed.

Respectfully,

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